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NATIONAL MARINE FISHERIES SERVICE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

SIERRA CLUB, INC.,	)	Case No. 15-cv-05872 EDL
	)	
Plaintiff,	)	
	)	<b>ANSWER TO COMPLAINT FOR</b>
v.	)	<b>DECLARATORY AND INJUNCTIVE RELIEF</b>
	)	
NATIONAL MARINE FISHERIES SERVICE,	)	
	)	
Defendant.	)	

**ANSWER**

Defendant NATIONAL MARINE FISHERIES SERVICE (“NMFS” or “Defendant”) hereby responds to Plaintiff’s Complaint for Declaratory and Injunctive Relief as follows:

**I. NATURE OF THE CASE**

1. The allegations contained in Paragraph 1 consist of Plaintiffs’ characterization of this civil action as brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to which no response is required. To the extent that a response is required, Defendant denies each and every factual allegation in Paragraph 1.

2. The allegations contained in Paragraph 2 consist of Plaintiffs’ characterization of the content of its FOIA requests, to which no response is required. Defendant admits that Plaintiff’s FOIA

1 requests are attached to the Complaint as Exhibit A. Otherwise, to the extent that a response is required,  
2 Defendant denies each and every factually allegation in Paragraph 2.

3 3. The allegations contained in Paragraph 3 consist of Plaintiffs' assertions about industrial  
4 cooling water and their impact on wildlife, which are not material to this FOIA dispute. As such, no  
5 response is required. To the extent that a response is required, Defendant is without sufficient  
6 knowledge to admit or deny the factual allegations and, on that basis, denies each and every allegation in  
7 Paragraph 3.

8 4. Defendant admits that, despite its good-faith efforts, it has not yet completed its  
9 production of documents in response to Plaintiff's August 11, 2014 FOIA request. However, Defendant  
10 has produced a substantial number of documents in response to Plaintiff's FOIA request. Except as  
11 expressly admitted, Defendant denies the allegations in Paragraph 4.

12 5. Defendant denies the allegations in Paragraph 5.

## 13 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

14 6. Responding to Paragraph 6, Defendant admits that this Court has jurisdiction over this  
15 FOIA action.

16 7. Responding to Paragraph 7, Defendant admits that venue is proper in this District.

17 8. Responding to Paragraph 8, Defendant admits that assignment to the San Francisco  
18 Division is appropriate.

## 19 **III. PARTIES**

20 9. Defendant is without sufficient knowledge to admit or deny the factual allegations in  
21 Paragraph 9 and, on that basis, denies each and every allegation in Paragraph 9.

22 10. Defendant admits that it is an office of the National Oceanic and Atmospheric  
23 Administration within the Department of Commerce. Defendant admits that it is also known as NOAA  
24 Fisheries. Defendant admits that it is subject to FOIA. Defendant admits that it is in possession (and  
25 has produced) some of the documents requested in Plaintiff's FOIA request. Except as expressly  
26 admitted, Defendant denies the allegations in Paragraph 10.

27 11. The allegations contained in Paragraph 11 consist of legal conclusions, to which no  
28 response is required. To the extent that a response is required, Defendant denies each and every factual

1 allegation in Paragraph 11.

2 12. The allegations contained in Paragraph 12 consist of legal conclusions, to which no  
3 response is required. To the extent that a response is required, Defendant denies each and every factual  
4 allegation in Paragraph 12.

5 13. The allegations contained in Paragraph 13 consist of legal conclusions, to which no  
6 response is required. To the extent that a response is required, Defendant denies each and every factual  
7 allegation in Paragraph 13.

8 14. The allegations contained in Paragraph 14 consist of legal conclusions, to which no  
9 response is required. To the extent that a response is required, Defendant denies each and every factual  
10 allegation in Paragraph 14.

11 15. The allegations contained in Paragraph 15 consist of legal conclusions, to which no  
12 response is required. To the extent that a response is required, Defendant denies each and every factual  
13 allegation in Paragraph 15.

14 16. The allegations contained in Paragraph 16 consist of legal conclusions, to which no  
15 response is required. To the extent that a response is required, Defendant denies each and every factual  
16 allegation in Paragraph 16.

17 17. The allegations contained in Paragraph 17 consist of legal conclusions, to which no  
18 response is required. To the extent that a response is required, Defendant denies each and every factual  
19 allegation in Paragraph 17.

20 **IV. STATEMENT OF FACTS**

21 18. Defendant is without sufficient knowledge to admit or deny the factual allegations in  
22 Paragraph 18 and, on that basis, denies each and every allegation in Paragraph 18.

23 19. Defendant is without sufficient knowledge to admit or deny the factual allegations in  
24 Paragraph 19 and, on that basis, denies each and every allegation in Paragraph 19.

25 20. Defendant is without sufficient knowledge to admit or deny the factual allegations in  
26 Paragraph 20 and, on that basis, denies each and every allegation in Paragraph 20.

27 21. Defendant is without sufficient knowledge to admit or deny the factual allegations in  
28 Paragraph 21 and, on that basis, denies each and every allegation in Paragraph 21.

1           22.     The allegations contained in Paragraph 22 consist of a quotation from a Second Circuit  
2 decision, to which no response is required. To the extent that a response is required, Defendant denies  
3 each and every factual allegation in Paragraph 22.

4           23.     The allegations contained in Paragraph 23 consist of legal conclusions, to which no  
5 response is required. To the extent that a response is required, Defendant denies each and every factual  
6 allegation in Paragraph 23.

7           24.     The allegations contained in Paragraph 24 consist of legal conclusions, to which no  
8 response is required. To the extent that a response is required, Defendant denies each and every factual  
9 allegation in Paragraph 24.

10          25.     The allegations contained in Paragraph 25 consist of legal conclusions, to which no  
11 response is required. To the extent that a response is required, Defendant denies each and every factual  
12 allegation in Paragraph 25.

13          26.     The allegations contained in Paragraph 26 consist of Plaintiff's characterization of the  
14 EPA's proposed regulations, to which no response is required. To the extent that a response is required,  
15 Defendant denies each and every factual allegation in Paragraph 26.

16          27.     Responding to Paragraph 27, Defendant admits that on June 18, 2013, the EPA requested  
17 formal consultation with NMFS and the U.S. Fish and Wildlife Service and that NMFS responded on  
18 July 23, 2013, confirming the initiation of formal consultation on the issuance on implementation of the  
19 proposed regulation. Responding to the remaining allegations in Paragraph 27, Defendant is without  
20 sufficient knowledge to admit or deny the factual allegations and, on that basis, denies each and every  
21 allegation in Paragraph 27.

22          28.     Defendant admits the allegations in Paragraph 28.

23          29.     Defendant is without sufficient knowledge to admit or deny the factual allegations in  
24 Paragraph 29 and, on that basis, denies each and every allegation in Paragraph 29.

25          30.     Defendant admits that the EPA's final rule under § 316(b) of the Clean Water Act for  
26 existing electric generating plans and factories was published in the Federal Register on August 15,  
27 2014.

28          31.     Defendant admits that Exhibit A is a true and correct copy of the FOIA request that

1 Plaintiff submitted to NMFS.

2 32. Defendant denies that allegations in Paragraph 32.

3 33. Defendant admits the allegations in Paragraph 33.

4 34. Responding to Paragraph 34, Defendant admits that counsel for the parties conferred  
5 regarding the scope of the FOIA requests on or about August 27, 2014.

6 35. Defendant admits the allegations in Paragraph 35.

7 36. Defendant admits the allegations in Paragraph 36.

8 37. Defendant admits that, notwithstanding the fact it was working diligently to respond to  
9 the FOIA request, as of December 3, 2014, it had not yet made its first production. Defendant further  
10 admits that on or about December 3, 2014, Sierra Club requested a status update.

11 38. Responding to Paragraph 38, Defendants states that it was working diligently to search  
12 for and review documents in response to the FOIA requests and admits the allegations in Paragraph 38.

13 39. Defendant admits the allegations in Paragraph 39.

14 40. Defendant admits the allegations in Paragraph 40.

15 41. Defendant admits the allegations in Paragraph 41.

16 42. Defendant admits the allegations in Paragraph 42.

17 43. Defendant admits the allegations in Paragraph 43.

18 44. Defendant admits the allegations in Paragraph 44.

19 45. Defendant admits the allegations in Paragraph 45.

20 46. Defendant admits the allegations in Paragraph 46.

21 47. Responding to Paragraph 47, Defendant admits that, on or about November 13, 2015,  
22 Plaintiff submitted the administrative appeal to NMFS reflected in Exhibit K. Except as expressly  
23 admitted, Defendant denies the remaining allegations in Paragraph 47.

24 48. Responding to Paragraph 48, Defendant admits that Plaintiff filed an administrative  
25 appeal on November 13, 2015. In accordance with U.S. Department of Commerce Regulations, the  
26 Department of Commerce Office of the Assistant General Counsel for Litigation, Employment, and  
27 Oversight sent an acknowledgement letter to Plaintiff confirming receipt of the administrative appeal.  
28 15 C.F.R. §4.10(b)(1). Thereafter, upon receipt of Plaintiff's Complaint for Declaratory and Injunctive

1 Relief herein, Defendant elected not to proceed with the administrative appeal process in accordance  
2 with U.S. Department of Commerce Regulations. *See* 15 C.F.R. §4.10(e). Except as expressly  
3 admitted, Defendant denies the allegations in Paragraph 48.

4 49. Defendant admits that on or about December 11, 2015, it made its fifth interim  
5 production to Plaintiff, comprised of 587 emails and attachments. 106 documents were released in their  
6 entirety. 269 documents were partially redacted; 212 documents were fully redacted; and 392 were  
7 withheld. Except as expressly admitted, Defendant denies the allegation in Paragraph 49.

8 50. Defendant admits that, despite its diligence and although a substantial number of the  
9 requested documents have been produced, it has not yet completed its production in response to  
10 Plaintiff's large and complex, August 11, 2014 FOIA request. Except as expressly admitted, Defendant  
11 denies the allegations in Paragraph 50.

12 **V. CLAIMS FOR RELIEF**

13 **FIRST CAUSE OF ACTION**

14 51. Defendant incorporates by reference its response to each allegation set forth above as if  
15 fully set forth herein.

16 52. Defendant denies the allegations in Paragraph 52.

17 53. Defendant denies the allegations in Paragraph 53.

18 54. Defendant denies the allegations in Paragraph 54.

19 55. Defendant denies the allegations in Paragraph 55.

20 **SECOND CAUSE OF ACTION**

21 56. Defendant incorporates by reference its response to each allegation set forth above as if  
22 fully set forth herein.

23 57. Defendant denies the allegations in Paragraph 57.

24 58. Defendant denies the allegations in Paragraph 58.

25 59. Defendant denies the allegations in Paragraph 59.

26 60. Defendant denies the allegations in Paragraph 60.

27 61. Defendant denies the allegations in Paragraph 61.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE  
(Failure to State a Claim)**

1. The Complaint fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE  
(Exhaustion of Administrative Remedies)**

2. To the extent that Plaintiff alleges or asserts matters not contained in a legally sufficient and timely administrative claim, this action is barred by a failure to exhaust administrative remedies.

**THIRD AFFIRMATIVE DEFENSE  
(Mootness)**

3. The Complaint raises claims that are moot.

**FOURTH AFFIRMATIVE DEFENSE  
(Statutory FOIA Exemptions)**

4. The FOIA request that is the subject of this lawsuit implicates certain information that is protected from disclosure by one of more statutory exemptions. Disclosure of such information is not required or permitted.

Defendant reserves the right to assert additional affirmative defenses as warranted.

**PRAYER FOR RELIEF**

WHEREFORE, Defendant prays that:

1. Plaintiff take nothing by its Complaint;
2. Defendant has judgment against Plaintiff;
3. Defendant be awarded its costs of suit; and
4. For such other and further relief as the Court may deem proper.

DATED: January 27, 2016

Respectfully submitted,

BRIAN J. STRETCH  
Acting United States Attorney

/s/ Wendy M. Garbers  
WENDY M. GARBERS  
Assistant United States Attorney

Attorneys for Defendant  
NATIONAL MARINE FISHERIES  
SERVICE